

IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE

R.S.O. 1980, c. 340

AND IN THE MATTER OF

A complaint made by Mrs. Joicilda Foster of Toronto, Ontario alleging discrimination in employment and a contravention of the Ontario Human Rights Code by the Queen Elizabeth Hospital, 550 University Avenue, Toronto, Ontario.

REC'D O.H.R.C.			
INITIAL	DATE	INITIAL	DATE
AUG 26 1983			

BOARD OF INQUIRY

Professor Ian A. Hunter

APPEARANCES

Mr. J. McNamee, Esq.

Counsel to the Complainant,
Joicilda Foster, and to the
Ontario Human Rights Commission

Mr. David W. Brady, Esq.

Counsel to the Queen Elizabeth
Hospital

DECISION

Mrs. Joicilda Foster, the complainant, was first employed as a cleaner by Queen Elizabeth Hospital in 1978. She was hired on May 12, 1978, and commenced working at the hospital's Dunn Avenue location. A month later she was transferred to the cleaning staff at the hospital's University Avenue location. On July 14, 1978, after approximately two months of employment, she was fired. The man who fired her was Mr. Correia, head of the hospital's cleaning department. Five days later, on July 19, 1978, Mrs. Foster filed a formal complaint with the Ontario Human Rights Commission alleging that her firing occurred because of her race and colour contrary to section 4 of the Ontario Human Rights Code.

The Code requires the Ontario Human Rights Commission to investigate complaints and "... to endeavour to effect a settlement of the matter complained of." Through conciliation, the matter was settled and, as a result of that settlement, Mrs. Foster was reemployed at Queen Elizabeth Hospital on June 16, 1979. She was again employed on the cleaning staff as a regular part-time weekend cleaner. She regularly worked the 4 p.m. to 12 p.m. shift on Saturdays and Sundays, and was occasionally called in for shifts during the week to cover for an ill or absent cleaner. During the course of her approximately eight months re-employment (June 16, 1979 - February 15, 1980 -



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which I shall refer to in this decision as her second period of employment) she worked, in addition to regular weekends, approximately 31 weekdays on a casual call-in basis.

On February 15, 1980, Mrs. Foster's second period of employment was terminated by Mr. Edwin Crowder who supervised all cleaning staff at Queen Elizabeth Hospital.

On February 25, 1980, Mrs. Foster filed the complaint with the Ontario Human Rights Commission, which is the subject matter of these proceedings. That complaint (Exhibit 2) alleges that her employment was terminated "... as a reprisal for my having made a complaint under the Ontario Human Rights Code" in connection with her first dismissal.

Section 6 (as it then was) of the Ontario Human Rights Code prohibited employment reprisals against any person who had attempted to realize rights through a proceeding under the Code.

"No person shall,

(a) refuse to employ or to continue to employ any person;

(b) threaten to dismiss or threaten to penalize in any other way any person in regard to his employment or any term or condition thereof;

(c) discriminate against any person in regard to his employment or any term or condition thereof; or

(d) intimidate or coerce or impose any pecuniary

(d) continued

or other penalty upon any person
on the ground that such person
(e) has made or may make a complaint under
this Act..."

The single issue before me in this proceeding is this:
Has the Commission discharged the onus of proving, on a balance
of probabilities, that the reason for Mrs. Foster's second
termination was because of her prior complaint to the Ontario
Human Rights Commission?

The hospital denies Mrs. Foster's allegation and
asserts that she was discharged because of unsatisfactory work
performance.

The only direct evidence in support of the complaint
is Mrs. Foster's own testimony. On February 15, 1980, she
testified that Mr. Crowder had a meeting with her in his office:

"On February 15 when he called me inside the
office he said to me, 'Mrs. Foster, this is
what I have called you in the office for to
tell you that you are no longer working here.'
I asked him if he could explain and tell me why.
He didn't want to explain anything to me and
tell me why. He said that I must get out of
the office because I have laid a complaint
with the Human Rights Commission already and
I am trouble, so I must get out of the office.

So he handed me the papers. I took it around
to the personnel. I asked if I could speak to

Mr. Lefort and he told me that he was not in the office, and he don't want to speak to me because he have got the authority from Mr. Lefort to let me go." (Transcript vol. 1 p.26)

In his sworn testimony, Mr. Crowder categorically denied this:

"Q. Did you say to her that ... something to the effect that she was 'trouble,' or she was a 'troublemaker'; something either in those words or to that effect?

A. Not in those words nor to that effect, other than the fact that, as I said, I outlined the difficulties we had had with her as an employee, which are obviously some problems but not a direct derogatory remark with that intent, other than the concerns we had with her work.

Q. I think you have answered it, but we should be specific. Did you say to her that she was let go or terminated because she had made a complaint to the Human Rights Commission?

A. Absolutely not." (Transcript vol. 2 p.111-112)

The only indirect evidence that might conceivably be considered to support the allegation of a reprisal motive in the decision to dismiss Mrs. Foster was the evidence of Jacques Caza, who at the relevant time was a supervisor with Modern Building Cleaners whose supervisory responsibilities included Mrs. Foster. Mr. Caza's actual contact with Mrs. Foster was



minimal; when she reported for her weekend shift, he would hand over the keys and assign her duties to her. At most, Mr. Caza's shift would overlap with Mrs. Foster's shift for about one-half hour.

Mr. Caza was aware of Mrs. Foster's first complaint to the Ontario Human Rights Commission. When she was rehired at Queen Elizabeth Hospital on June 16, 1979, Mr. Caza received a written memorandum from Mr. Crowder indicating that all staff were to give Mrs. Foster "a fair chance." During her eight month period of second employment, Mr. Caza testified that Mr. Crowder occasionally talked to him about the quality of Mrs. Foster's work.

"He asked me to make sure that she did her job properly and to report anything that she might have done to ... I mean done wrong to him." (Transcript vol. 1, p. 139)

I quote this comment because it is the only other, even remotely, corroborative evidence. However, I do not find it surprising that Mr. Crowder would ask Mr. Caza to observe Mrs. Foster and to report to him on her performance. First, this was precisely the proper chain of authority: Mr. Caza supervised Mrs. Foster; Mr. Crowder supervised Mr. Caza. Second, from the fall of 1980 on, Mr. Crowder testified

that he was concerned about the number of complaints he received concerning Mrs. Foster's work; it is hardly incriminating, therefore, that Mr. Crowder would be concerned and would speak to her supervisor and ask him to report deficiencies to him. Third, Mr. Caza's evidence established that Mrs. Foster was not singled out for special attention. He testified that there were other cleaners whose work was not up to acceptable standards; in each case, Mr. Crowder requested Mr. Caza to document their deficiencies and report them to him.

Mr. Caza testified that he considered Mrs. Foster's work to be generally satisfactory. However, there were two concerns: (a) She was late for work several times. Mr. Caza reprimanded her for this. Sometimes he documented her lateness; other times he testified that he did not record it.

(b) Mr. Caza also expressed some concern that change rooms and washrooms were not as clean as they might have been. Mrs. Foster's cleaning duties included such areas. Mr. Caza was reluctant to blame Mrs. Foster for the state of the washrooms, however, because these were public areas and he considered that they might have been dirtied by general use after Mrs. Foster had cleaned them.

After Mrs. Foster's dismissal (i.e. sometime after

February 15, 1980) Mr. Crowder requested a written memorandum from Mr. Caza concerning Mrs. Foster's lateness. Mr. Caza prepared such a memorandum (Exhibit 5: "Mrs. Foster often comes into work around five minutes late. I have talked to her regarding this, but she is still not very punctual"). Mr. Caza signed it, and, at Mr. Crowder's suggestion, dated it February 2, 1980. Although this may have been the date on which Mr. Caza first conveyed the information to Mr. Crowder, the erroneous date of the memorandum leaves the unfortunate impression of a deliberate attempt to deceive and (no doubt properly) it excited suspicion in the Human Rights officer who investigated the complaint. Nevertheless, having heard both Mr. Caza's and Mr. Crowder's explanation of the dating of the memorandum, I am satisfied that it was attributable to Mr. Crowder's ineptitude on this occasion and was not a deliberate attempt to fabricate misleading evidence.

Three former co-workers from the hospital cleaning staff testified that they considered Mrs. Foster to be a satisfactory cleaner. However, there are defects in the evidence of two of these three witnesses.

(1) Ethylyn Rampersad's observations related only to Mrs. Foster's first period of employment at Queen Elizabeth

Hospital. Mrs. Rampersad was uncertain whether she ever worked with Mrs. Foster during her second period of employment, which is the subject matter of this complaint. Accordingly, I discount her evidence.

(2) Juliania Ljubovich occasionally worked with Mrs. Foster during her first period of employment. However, during the second period of Mrs. Foster's employment, Mrs. Ljubovich was a ward aid and knew nothing of Mrs. Foster's work performance.

(3) Mrs. Shirley Fraser testified that she saw Mrs. Foster three times on her floor during the second period of Mrs. Foster's employment. From this very limited observation, Mrs. Fraser considered that Mrs. Foster was doing a "pretty good" and "very fair" job. These descriptions are less than effusive praise; Mr. McNamee suggested that "average" or "adequate" might be synonymous descriptions of the complainant's work performance. Since this evidence relates to the relevant period of employment, I have considered it, along with the evidence of Mrs. Ribeiro, Mr. Roposo, and Mr. Crowder at arriving at my decision.

The complainant testified that she never received complaints from anyone about her work performance. She made this denial generally (e.g. Q.: I take it with respect to complaints you were not aware of complaints made by the nursing office or by the switchboard or by anybody?" A.: "No, I had no complaints."

Transcript Vol.1, p.66). Mrs. Foster repeated this denial with respect to specific named individuals: Mr. Crowder; Vol.1, p.54; Mr. Roposo; Vol.1, p.55; Mrs. Juvenalia Ribeiro; Vol.1, p.57-58; other day cleaners; Vol.1, p.59.

Mrs. Foster's denials are simply not credible. Mr. Jamie Roposo testified. He supervised Mrs. Foster on some occasions when she was called in to work on the day shift. When he was asked to describe her work he did so in these terms: She worked very slowly; she did not remove fingernail marks from walls; her high dusting was poor; she did not replace toilet paper in washrooms.

Mr. Roposo testified that he repeatedly "went after" Mrs. Foster about these deficiencies. Despite his reprimands, the fingernail marks were still not removed when he checked back. He testified that he repeatedly received complaints from those cleaning ladies whose cleaning trolleys Mrs. Foster used on the weekend shift. These carts would be left dirty and the rags would not be cleaned. It is regrettable that the respondent did not see fit to call one or more of these cleaning ladies who made such complaints. However, Mr. Roposo testified that he not only received complaints to this effect, but he observed it first hand himself. I accept Mr. Roposo's evidence on this point, even though

he was in some confusion as to precisely which cleaning ladies made specific complaints. Mr. Roposo testified that on one occasion he specifically came to the hospital on a weekend to tell Mrs. Foster to clean well and to do a good job so that he would not have complaints from the regular cleaning ladies on Monday.

Mrs. Foster denies that Mr. Roposo ever complained to her about her work (Transcript Vol.1, p.55-56). After observing both witnesses, I am satisfied that Mr. Roposo was telling the truth and that each instance to which he testified did occur and that Mrs. Foster has either forgotten, or chosen to conceal, these complaints.

Juvenalia Ribeiro, who was the supervisor of the day cleaning staff, also occasionally supervised Mrs. Foster. She described Mrs. Foster's work habits in this way:

"Q. Did you have occasion as supervisor to look at Mrs. Foster's performance in terms of her work?

A. Yes, I did.

Q. Can you tell me what you observed with respect to her work?

A. Yes. She was very slow. Her job was unacceptable. She was a hard person to take directions... demanding. When she was told to go back for some reason because she didn't

complete her duty, her job was not acceptable, she come with all kinds of excuses. At one point in time she got very upset because she said that I was after her because of her colour. That was not true. Her colour had nothing to do.

Q. I just want to go through one or two of your statements with you. You said her job was not acceptable. Can you tell us what you mean by that, in what ways?

A. For instance, like when she vacuumed the floors, she was not vacuuming under the beds, behind the doors, things like that. When she was doing the washrooms, the toilets, the bottom of the toilets; the sinks, the bottom of the sinks.

Q. Would you bring this to her attention?

A. Yes.

Q. What would happen?

A. Like she never said much. Like, she never refused to go back. She would go back, but, you know, she never said much that... she never showed to me that she was really interested in improving herself to do a better job. She seemed to be mad like the way she reacted. I could see on her face that she was upset, but never said much about it.

Q. There was one time up... you said something about excuses, but what I want to ask you about is that you said one time she said something about her colour?

A. Yes.

Q. Could you tell me a little bit about that?

A. If I am not wrong, she was working on the north wing, 3 north or 4 north. That day she was supposed to vacuum the whole floor. So when I went there, she didn't, okay? She didn't vacuum. I could see the dust all over.

So I approached her and I asked her if she did vacuum. First she told me that she did vacuum. Then after I... you know, when I showed her, she said, 'Oh, no, I didn't really use the vacuum. I used the dust mop.' Then after I said to her,

'You know that you are not allowed to use the dust mop in the patients' homes.' She said...

Q. I am sorry, 'You are not allowed to use the dust mop'...?

A. ... 'Inside of the patients' homes.'

Q. ... 'Inside of the patient areas?'

A. She said, 'Oh, it was just to see if I could finish my work with that faster.' Then after she turned around and she said that she didn't vacuum at all because she was tired.

She got very upset at the time and she said that I was after her because of her colour." Transcript

Vol.2, p.55-57

In cross examination, Mrs. Foster was asked specifically about this incident with Mrs. Ribeiro.

"Q. Now, let us deal with the second time around. You worked with Juvenalia on days when you were called into work?

A. Yes.

Q. Is it your evidence that she did not speak to you at any time...

A. Yes.

Q. ... about the quality of your work?

A. No, she didn't.

Q. Okay, let me be more specific. Did she not talk to you about your being slow?

A. No.

Q. Okay.

A. She never.

Q. Did she talk to you about the cleaning you were doing and that you did not do it completely and that you would have to go back and do it again?

A. No, she didn't.

Q. You're sure about that?

A. Yes, I am sure.

Q. Can you recall Juvenalia speaking to you about your work in any fashion, whether it be good or bad?

A. I have no idea. She never say anything about me towards my work.

Q. Well, my understanding is that she spoke to you a number of times and one time specifically you gave her the excuse that you thought you were being singled out because of your colour.

Did you say to Juvenalia that you thought you were being given special treatment by her because you were black or because of your colour?

A. No.

Q. You don't recall that?

A. I didn't say that to Juvenalia.

Q. Are you sure you didn't say it?

A. No.

Q. Do you recall making that excuse about your being black being given to any member of staff in terms of the quality of your work?

A. No, not to any staff." (Transcript, Vol.1 p.56-58)

I accept Mrs. Ribeiro's evidence. It is consistent with

Mr. Roposo's evidence and inconsistent with the complainants evidence. Corroboration of Mrs. Ribeiro's version of the North Wing incident is contained in a handwritten memorandum (part of Exhibit 8) prepared by Mr. Crowder following a conversation with Mrs. Ribeiro on or about February 14, 1980.

Finally, I have to consider the evidence of Edwin Crowder, who in 1980, was in charge of the housekeeping department and was the man who made the decision to terminate Mrs. Foster's employment.

Mr. Crowder was not involved in Mrs. Foster's first discharge from Queen Elizabeth Hospital in 1978. However, he was instrumental in her rehiring in June, 1979. He testified that he had an opening for a light duty cleaner position on the weekend shift. Mr. Lefort spoke to Mr. Crowder and asked him to consider Mrs. Foster for this position. Mr. Crowder then reviewed Mrs. Foster's file and made the decision to offer her the position. He met with Mrs. Foster and told her she would be given a fair opportunity and would be considered for additional work or for full-time employment on the same basis as any other staff member. He then sent a written memorandum to all supervisory staff stating that Mrs. Foster was to be given a fair chance.

For the first few months of her employment, Mr. Crowder considered Mrs. Foster's work to be satisfactory. Then, in the fall of 1980, he began to receive complaints that she was not doing her job properly. These complaints came from several sources, including her supervisors Mrs. Ribeiro, Mr. Roposo and Mr. Caza; the latter complaint concerned lateness. Mr. Crowder also received complaints from the switchboard operators. The existence of these complaints is corroborated by the evidence of Mrs. Ribeiro, Mr. Roposo and Mr. Caza. It is also corroborated by the documents which Mr. Crowder began to record and place in Mrs. Foster's file. Introduced in evidence, and verified as being in his handwriting by Mr. Crowder, were five documents dated January 14 and 15, 1980; January 26, 1980; February 12, 1980; February 14, 1980; and one undated (collectively, Exhibit 8). Each of these documents records an instance of Mrs. Foster's unsatisfactory work performance.

On February 14, 1980, Mr. Crowder reviewed Mrs. Foster's file with Mr. Lefort and made a decision to terminate her employment. The following day he prepared a form entitled: Notice of Termination of Employment. That form (Exhibit 9) states the following reason for dismissal: "Unacceptable behaviour and work. Does not accept direction to an acceptable level."

To summarize the evidence, then, the only evidence in support of the Commission's allegation that the reason for Mrs. Foster's second dismissal was reprisal was her own testimony that Mr. Crowder referred to her prior complaint to the Ontario Human Rights Commission at the meeting on February 15, 1980, when he discharged her. This was categorically denied by Mr. Crowder.

The complainant testified that her work performance was satisfactory and that she never received complaints about her work. This is specifically refuted by the evidence of Mrs. Ribeiro, Mr. Roposo and Mr. Crowder. Further corroboration is contained in handwritten documents prepared in January and February 1980 by Mr. Crowder and put in the complainants file at that time.

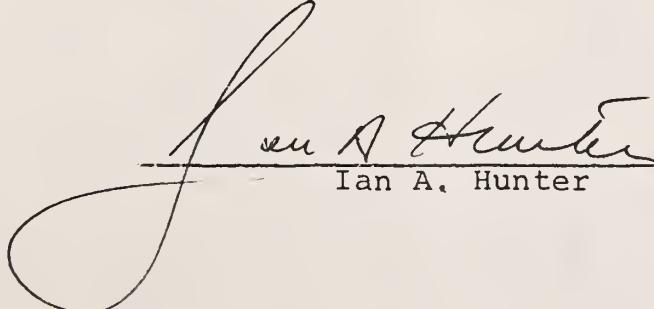
I do not accept the complainant's evidence. I find that the reason for her dismissal was unsatisfactory work performance and was not because of a prior complaint to the Ontario Human Rights Commission.

In this matter, I do not sit as an arbitrator with authority to substitute a lesser penalty. I note with regret that Mr. Crowder did not give the complainant verbal or written

notices of unsatisfactory work; nor did he follow a system of progressive discipline. As a matter of personnel management, Mr. Crowder's actions leave much to be desired. In argument, Mr. McNamee characterized Mrs. Foster's dismissal by Mr. Crowder as "abrupt, sudden and without prior notice." I agree with this characterization, however, my jurisdiction is not to determine whether the penalty imposed was appropriate, but rather to determine whether the penalty was imposed because of a prior complaint to the Ontario Human Rights Commission or because of unsatisfactory work performance. On the factual evidence before me, I can come to no other conclusion but that Mrs. Foster was fired because of her unsatisfactory work performance.

Accordingly, the complaint is dismissed.

DATED at the City of London in the County of Middlesex this 23rd day of August, 1983.



Ian A. Hunter

